400

SUPREME COURT OF THE UNITED STATES.

No. ~~68.~~ 14.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF ALEXANDRIA, PLAINTIFFS IN ERROR,

VERSUS

THOMAS SWANN.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE COUNTY OF ALEXANDRIA, D. C.

INDEX.

	Original.	Print.
Citation	1a	1
Writ of error	2a	2
Title	1	2
Declaration	1	3
Common order	4	4
Common order confirmed, and writ of inquiry awarded	4	4
Issue joined, and jury sworn	4	4
Special verdict	5	5
Note.....(included in special verdict)	6	5
Notice of protest.....do do do	9	7
Protest.....do do do	10	7
Judgment	12	9
Clerk's certificate	13	9

DISTRICT OF COLUMBIA, *to wit:*

To Thomas Swann, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, being the present seat of the National Government, on the second Monday in January next, pursuant to a writ of error filed in the clerk's office of the United States' circuit court of the District of Columbia, for the county of Alexandria, wherein the President, Directors, and Company of the Bank of Alexandria are plaintiffs, and you are defendant, to show cause, if any there be, why the judgment rendered against the said Bank of Alexandria, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

The following is a copy of the writ of habere facias possessionem, referred to in the bill of exceptions herein, to wit:

The United States of America to the marshal of the Kentucky district, greeting:

Whereas John Doe, on the demise of Samuel Smith, in our seventh circuit court of the United States of America, in and for the district of Kentucky, has, by a judgment of the said court, recovered against Jacob Brinegar, Esq. Wilcox, Elijah Wilcox, and David Hagan, his term yet to come and unexpired of, in, and to one undivided moiety of two thousand five hundred acres of land, with its appurtenances. Therefore, we command you, that without delay you cause the said John Doe, on the demise of said Samuel Smith, to have possession of the land aforesaid, with the appurtenances; and how you shall have executed this writ, return to us on the first Monday in February next. In testimony whereof, John Marshall, Esq., Chief Justice of the Supreme Court of the United States, hath caused the seal of our said court to be hereunto affixed this 17th day of November, 1829, and in the 54th year of our independence.

Attest: JNO. H. HANNA, *C. C. C. K. D.* [SEAL.]

Marshal's return, to wit:

Executed by delivering peaceable possession of the within described premises to Samuel Plummer, agent of the plaintiff, from James McGuire, Will. Acres, and John Evans, who were tenants thereon. Dec. 14, 1829.

A. M. CLARK, *D. M for*
J. M. McCALLA, *M. K. D.*

UNITED STATES OF AMERICA, *7th circuit court, Kentucky district, sct.*

I, John H. Hanna, clerk of the seventh circuit court of the United States of America, in and for the district of Kentucky, do hereby certify that the foregoing pages contain a full, true, and complete transcript of the record and proceedings in the cause therein mentioned.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, this 10th day of June, in the year of our Lord one thousand eight hundred and thirty-one, and in the 55th year of our independence.

JOHN H. HANNA. [SEAL.]

400

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No. ~~68.~~ 16

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DISTRICT OF COLUMBIA, *to wit:*

To Thomas Swann, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, being the present seat of the National Government, on the second Monday in January next, pursuant to a writ of error filed in the clerk's office of the United States' circuit court of the District of Columbia, for the county of Alexandria, wherein the President, Directors, and Company of the Bank of Alexandria are plaintiffs, and you are defendant, to show cause, if any there be, why the judgment rendered against the said Bank of Alexandria, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable John Marshall, Chief Justice of the United States, this twenty-ninth day of November, 1831.

W. CRANCH.

Served, by leaving a copy of the within with Thomas Swann, January 11, 1832.

H. ASHTON, *Marshal.*

UNITED STATES OF AMERICA, *District of Columbia, to wit:*

The President of the United States of America to the Judges of the United States' Circuit Court of the District of Columbia, greeting:

Because in the record and proceedings, and also the rendering of the judgment of a plea which is in the said court for the county of Alexandria, before you, or some of you, between the President, Directors, and Company of the Bank of Alexandria, and Thomas Swann, in a plea of trespass on the case, manifest error hath happened to the great damage of the said President, Directors, and Company of the Bank of Alexandria, as by their complaint appears; and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, being the present seat of the National Government, on the first Monday in January next, that the record and proceedings aforesaid, being seen and inspected, the said Supreme Court may cause further to be done therein, what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable John Marshall, Chief Justice of the United States, this 29th day of November, eighteen hundred and thirty-one.

[SEAL.] EDM. I. LEE, *C. C.*

DISTRICT OF COLUMBIA, *to wit:*

Pleas before the honorable the judges of the United States' Circuit Court of the District of Columbia for the county of Alexandria, at the court-house, in the town of Alexandria, the eleventh day of November, in the year of our Lord 1831.

Title. The PRESIDENT, DIRECTORS, and COMPANY of the BANK of ALEXANDRIA, *plaintiffs,*

against

THOMAS SWANN, *defendant.*

Be it remembered, that, heretofore, to wit, at the rules held in clerk's office of the said court for the month of January, 1830, came the plaintiffs, by R. I. Taylor, esq., their attorney, and filed there a certain bill against the said defendant, which is in the words and figures following:

"ALEXANDRIA COUNTY, *to wit:*

"The President, Directors, and Company of the Bank of Alex- Declaration.
andria, complain of Thomas Swann, in custody, &c., of a plea of trespass on the case, for this, that whereas, heretofore, at the county aforesaid, to wit, on the 23d day of June, in the year of our Lord eighteen hundred and twenty-nine, one Humphrey Peake made his certain note in writing, commonly called a promissory note, his own handwriting being thereunto subscribed, bearing date at Alexandria the day and year aforesaid, and thereby he, sixty days after the date thereof, promised to pay to the defendant, by the name of Thomas Swann, esq., or order, the full and just sum of fourteen hundred dollars, current money of the United States, for value received, payable and negotiable at the said bank, and then and there delivered the said note to the said defendant; and the said defendant, to whom or to whose order the payment of the said sum of money in the said note mentioned was to be made, afterwards, and before the payment thereof; and before the time limited in said note for payment thereof, to wit, the day and year aforesaid, at the county aforesaid, endorsed the said note, his own proper handwriting being thereon subscribed, and thereby ordered and appointed the said sum of money, in the said note mentioned, to be paid to the said plaintiffs, and then and there delivered the said note, so endorsed, to the said plaintiffs, to wit, at the county aforesaid; of which said endorsement, so made as aforesaid on the said note, the said defendant, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, had notice. And the said plaintiffs aver that, afterwards, and after the expiration of the said time limited in the said note for the payment thereof, to wit, on the 25th day of August, in the year eighteen hundred and twenty-nine aforesaid, they showed and presented the said note, with the endorsement so made thereon as aforesaid, to the said Humphrey, at the said bank, and then and there required the said Humphrey to pay the same; but the said Humphrey did not then, nor at at any time since, pay the same, or any part thereof, to the said plaintiffs, but then and there wholly refused so to do; of all which premises, the said defendant, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, had notice. By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said sum of money in the said note mentioned to the said plaintiffs, according to the tenor and effect of the same, and the said endorsement thereon, and beng so liable, in consideration thereof, then and there undertook and promised to pay the same to the said plaintiffs, according to the tenor and effect thereof, and the endorsement thereon, whenever afterwards he should be thereto requested.

"And whereas the said defendant, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, was indebted to the said plaintiffs in another sum of 1500 dollars cents, like money, for the like sum of money by the said plaintiffs, to and for the use of the said defendant, before that time paid, laid out, and expended, at the special instance and re-

quest of the said defendant; and for other money by the said plaintiffs before that time lent and advanced to the said defendant, at his special instance and request; and for other money by the said defendant before that time had and received to the use of the said plaintiffs: and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, undertook and promised the said plaintiffs to pay the said last mentioned sum of money, when afterwards he should be thereunto required.

"Yet the said defendant the said sum of money herein mentioned, or any part thereof, although often thereto requested, (to wit, on the day and year aforesaid, at the county aforesaid, and often afterwards,) hath not paid, but the same, or any part thereof, to pay, has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs in the sum of two thousand dollars current money; and therefore they bring suit, and so forth.

R. I. TAYLOR, *P. Q.*

"JOHN DOE, } *and* } *Pledges, &c.*"
"RICH. ROE, }

Common order.

The defendant being arrested, and not appearing on the motion of the plaintiffs, by their attorney, it is ordered that judgment be entered for the plaintiffs against the defendant, for what damages the plaintiffs have sustained by occasion of the said defendant's non-performance of the promise and assumption in the declaration mentioned, unless the said defendant shall appear and plead to issue at the next rules.

Common order confirmed, and writ of inquiry awarded.

And at the rules held in the clerk's office for the month of February, 1830, the defendant still failing to appear; on the motion of the plaintiffs, by their attorney, it is ordered that the last order made against him in this cause, be confirmed, and that the plaintiffs' damages be ascertained by a jury at the next term.

Non assumpsit joined.

And at a court continued and held for the District and county aforesaid, the tenth day of November, 1830, came as well the plaintiffs by their attorney, as the defendant in his proper person; and the defendant saith that he did not assume upon himself in manner and form as the plaintiffs against him have complained; and of this, he putteth himself upon the country, and the plaintiffs likewise.

Jury sworn and affirmed.

And thereupon came a jury, to wit, Joseph Smith, Charles C. Smoot, Samuel Wheeler, Timothy Mountford, Matthias Snyder, John Adam, Benoni Wheat, Levi Hurdle, Alexander McKenzie, Bazil B. Hopkins, Robert Conway, and Peter E. Hoffman, who being sworn and affirmed well and truly to try the issue joined, and to give a true verdict according to the evidence, by consent of the parties, and with the assent of the court, are continued until to-morrow.

At another day, to wit, at a court continued and held for the District and county aforesaid, the eleventh day of November, 1830, the jury sworn to try the issue in this cause appeared in court, and

returned the following special verdict: "We, of the jury, find that one Humphrey Peake, on the fourteenth day of March, 1826, obtained, for his own accommodation, a discount at the bank of the plaintiffs, for the sum of fourteen hundred and fifty-seven dollars and sixty cents, on his note for that amount, endorsed by defendant on the day and year aforesaid, payable sixty days after date; that the said discount was regularly continued from that time until the 5th day of February, 1828, by new notes of the said Humphrey Peake for this same sum, endorsed by the defendant, and discounted at the said bank, to take up the preceding notes, the sums discounted on which new notes were regularly so applied; that, on the said 5th day of February, 1828, a note of the said Humphrey Peake for $1,457, of that date, payable sixty days after date to the defendant, and by him endorsed, negotiable and payable at the said bank, was there discounted towards taking up a note of the said Humphrey, endorsed by defendant, and discounted as aforesaid, for the sum of $1,457 60, which became due on the said 5th day of February, 1828; and that the discount so made on the said note of $1,457, on the said 5th February, was regularly continued by a series of notes of the said Humphrey, endorsed by the defendant for the said last mentioned sum, negotiable and payable at said bank, until the 23d June, 1829; all which discounts, so made, were applied regularly towards the discharge of the notes before discounted as aforesaid at the said bank. We find that, on the 23d day of June, 1829, a note of the said Humphrey Peake for the sum of $1,457, endorsed and discounted as aforesaid, became due and payable at the said bank; and that, on the said 23d day of June, 1829, the note in the declaration mentioned, was, at the instance of the said Humphrey, discounted at the said bank as and for a note of $1,457, for the purpose of taking up the note of the said Humphrey, endorsed and discounted as aforesaid, which became due on the said 23d June; and that the sum of $1,441 45, the discount so made, was applied towards that purpose: that, when the said discount was made, the said note was, from reference to the figures in the margin only, mistaken as a note for $1457. We find that the body and signature of the said note, dated the 23d day of June, including the date and figures in the margin, are wholly in the handwriting of the said Humphrey, and were written by him; and that the endorsement of the name of the defendant thereon, is in the handwriting of the defendant, and was made by him for the purpose of having the said note discounted at the said bank for the object before expressed; and we find that the said note and endorsement are in the words and figures following:

Special verdict.

'ALEX'A., 23*d June*, 1829.

'1457.

'Sixty days after date, I promise to pay to Thomas Swann, esq., or order, for value received, fourteen hundred dollars payable and negotiable at the Bank of Alexandria.

'HUMPH. PEAKE.'

Note.

(Endorsed—'Tho. Swann."

"We find that, during the whole period of time before mentioned, that is to say, from the 5th day of February 1828, and from thence to this day, there was no other note of the said Humphrey, endorsed by the said defendant, discounted by the said bank, or in the said bank for collection or otherwise. We find that the business of the said bank always has been, and yet is transacted at their banking house, in the town of Alexandria; and that the defendant, on the 25th day of August, 1829, for a long time before, and ever since, was, and ever has continued to be an inhabitant and resident of the city of Washington, in the District of Columbia, distant about seven miles from Alexandria. We find that, during the whole month of August, in the year 1829, the mail from Alexandria to the said city of Washington, and to other towns on the main northern route, was made up once a day; that it closed at nine o'clock P. M., on each day, and that letters for Washington and for the north, put in after half an hour after eight P. M., were not, in the general course of proceedings in the post-office at Alexandria, sent by the mail which closed on that day, but were post-marked on the succeeding, and sent by the mail made up on such succeeding day; and that all letters for Washington and the north, put into the post office at Alexandria before half past 8 o'clock P. M., were post-marked on the day they were so put in, and sent by the mail which closed at 9 P. M., as before stated: that the mail for Washington and other northern towns, which was closed at Alexandria, as aforesaid, at 9 o'clock P. M., was sent off from Alexandria between twelve at night of the same day, and two o'clock in the morning of the succeeding day; sometimes, but very rarely, leaving Alexandria before 12 at night, as aforesaid, and generally leaving that place about two in the morning of the day succeeding the making up and closing of the mail at Alexandria, as aforesaid.

"We find that letters from Alexandria to Washington, sent by mail, were, during the period aforesaid, delivered out at Washington at any hour after eight o'clock A. M., on the day succeeding that on which the mail was closed at Alexandria for that place. We find that the hours of business at the said Bank of Alexandria, during the winter, have always been from 10 A. M. to 3 P. M., and, during the summer, from 9 A. M. to 3 P. M.; after which latter hour the clerks and officers left the bank, and attended no more to banking business during the day.

"We find that it is, and for a long time past, including the year 1829, has been the usage of the Bank of Alexandria, and other banks, in the town, to deliver out to the notary, on each day at 3 o'clock, all notes and bills discounted by, or to be paid at such banks, which have become due on such day for demand and protest; and for the notary to return such notes, with the protest for non-payment to the said bank, on the morning of the succeeding day, soon after the bank opened. We find that, on the 25th day of August, being the third day of grace on the note in the declaration mentioned, it was, by Benjamin C. Ashton, teller of the said bank, and during bank hours of that day, presented at said bank to James L. McKenna, cashier of the said bank, for payment;

that the said McKenna examined the books of the said bank, and found that the said Humphrey Peake had no money or funds there, and stated that fact to the said teller; that neither the said Peake, nor any other person appeared for him at the said bank to pay the said note; and that, before the 28th day of August, 1829, the said Peake had failed, and had left the town of Alexandria, where he had before that time resided.

"We find that the said note having remained unpaid on the said 25th August, 1829, it was, on the closing of the bank on that day, taken out by the said Benjamin C. Ashton, who was also a notary public, for protest, and was, on the morning of the 26th August, 1829, returned to the said bank with the protest, which was drawn up on the said 26th August, 1829; and that the said note, in the said declaration mentioned, remained in the said bank as its property, from the said 23d day of June, 1829, until about the 30th October, in the same year, when it was delivered to their attorney for suit, with the exception only of the time it was in the hands of the said Benjamin C. Ashton as notary, as aforesaid.

"We find that, on the 26th day of August, 1829, and long before the closing of the mail of that day at Alexandria, that Benjamin C Ashton, on behalf of the said bank, put into the post office at Alexandria a letter written by him, addressed to the defendant at Washington, intending by the said letter to give him notice of the non-payment of the said note, which letter was post-marked at the post office in Alexandria, 'Alex'a. D. C. Aug. 26,' and is in the words and figures following:

'ALEXANDRIA, *August* 26, 1829.

'SIR: A note drawn by Humphrey Peake for fourteen hundred and fifty seven dollars, dated Alexandria, 23d June, 1829, payable to you, or your order, at the Bank of Alexandria, sixty days after its date, by you endorsed, and for the payment of which you are held liable, is protested for non-payment, at the request of the President, Directors, & Co. of the said bank.

'Respectfully, your obedient servant,

'BENJ. C. ASHTON, *Not. Pub.*

'THOMAS SWANN, ESQ.

'*Washington City.*'

Which letter was received by the defendant in due course of mail, on the 27th day of August, 1829. We find the protest, before referred to, in the words and figures following:

'ALEX'A. 23d *June*, 1829.

'$1457.

Sixty days after date, I promise to pay to Thomas Swann, esq., or order, for value received, fourteen hundred dollars, payable and negotiable at the Bank of Alexandria.

'HUMPH. PEAKE.'

(Endorsed—'Tho. Swann.')

'UNITED STATES OF AMERICA, *District of Columbia, County of of Alexandria, to wit:*

'On the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and twenty-nine, at the request of the President, Directors, and Company of the Bank of Alexandria, I, Benjamin C. Ashton, a public notary in and for the county of Alexandria, by lawful authority duly apppointed and qualified, dwelling in Alexandria, in the county and District aforesaid, demanded payment of a note, of which the above is a copy, of the cashier of the Bank of Alexandria, at the said bank, and he answered that no funds were there for its payment; and, on the 26th day of the same month, I gave notice to the endorser, by mail, that the drawer of the said note had failed to pay it.

'Whereupon, I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer and endorser of the said note, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, and interest already incurred, or to be hereafter incurred, for the want of payment thereof.

'In testimony whereof, I have hereunto set my hand, and affixed my seal notarial, the day and year aforesaid.

[SEAL.] 'BENJ. C. ASHTON, *Notary Public.*'

'Protesting $1 $\frac{75}{100}$.'

"We find that no part of the said sum of fourteen hundred dollars, of the note in the declaration mentioned, has been paid.

"We find that the said Bank of Alexandria kept a book called an Offering Book, in which the different sums and notes offered for discount were entered; and that this book was always laid before the board of directors on the discount days in the bank, and the discounts agreed to be made by the board regularly entered in the said discount book.

"We find that the 23d day of June, 1829, was one of the regular discount days in the said bank; and on that day the said book was laid before the board of directors, and, among the other entries made for discount on that day, was one in the following words and figures:

'Humphrey Peake, Thomas Swann, Humph. Peake.

'June 23, August 22, 1457, 1,554, 1,441 46.'

"We find that the said entry was intended to mean that the said Humphrey Peake had offered for discount his note for $1,457, endorsed by the said defendant, and payable 60 days thereafter. We find that no note for $1,457, drawn by the said Humphrey Peake, and endorsed by the said defendant, had been offered for discount to the said bank on the said 23d of June, 1829; but that the note in the declaration mentioned, was on that day offered to the said bank for discount, and for the purpose of renewing for that amount the note of $1,457, then due at the said bank. We find that no note for $1,400, drawn by the said H. Peake, and endorsed by the said defendant, was ever entered on the books of the said bank for discount; nor is there any entry made upon

the books of the said bank, that any such note had ever been discounted by the said bank.

"We find that, upon the offering for $1457 before stated, the board of directors agreed to make a discount for that sum, and the same was entered in the discount book as discounted, and the proceeds carried to the credit of the said Humphrey Peake. We find that the said discount was intended by the board as a renewal of the note of $1,457 then due to the said bank; and that the note in the declaration mentioned, was intended to be designated in the Offering Book, by the said description of a note drawn by the said Peake, and endorsed by the defendant as a note for $1,457.

"If, on the whole matter aforesaid, the law be for the plaintiffs, then we find for the plaintiffs, and assess their damages to the sum of fourteen hundred dollars, being the principal sum due, to bear interest from the 26th day of August, 1829, till paid; and if the law be for the defendant, then we find for the defendant."

Judgment.

And now here, at this day, to wit, at a court continued and held for the District and county aforesaid, the aforesaid eleventh day of November, in the year of our Lord 1831, came the plaintiffs, by their attorney, and the said defendant in his proper person; and thereupon, the matters of law arising upon the special verdict in this cause, being argued, it seems to the court here that the law is for the defendant. Therefore, it is considered by the court that the plaintiffs take nothing by their bill, but for their false clamor be in mercy, &c.; and that the said defendant go thereof without day, and recover against the plaintiffs his costs by him about his defence in this behalf expended.

DISTRICT OF COLUMBIA, *to wit:*

I, Edmund I. Lee, Clerk of the United States' Circuit Court of the District of Columbia, for the county of Alexandria, do hereby certify that the foregoing is a true transcript of the proceedings of said court in the suit of the President, Directors, and Company of the Bank of Alexandria, against Thomas Swann, with all things touching the same, so far as they now exist among the records of my office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, this 2d day of January, A. D. 1832.

[L. S.] EDM. I. LEE, *C. C.*